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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1259

MARATHON OIL COMPANY,
Petitioner

v.

FEDERAL ENERGY ADMINISTRATION;
FRANK G. ZARB, Administrator,
Federal Energy Administration; and
ASHLAND OIL, INC.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional, Statutory and Regulatory Provisions Involved	4
Statement	4
Reasons for Granting the Writ	8
Conclusions	16

CITATIONS

Cases:

Algonquin, SNG, Inc. v. *FEA*, 518 F.2d 1051 (D.C. Cir.), *cert. granted*, 44 U.S.L.W. 3236 (U.S. Nov. 3, 1975) (No. 75-382) 14, 15
Amalgamated Meat Cutters Union v. *Connally*, 337 F. Supp. 737 (D.D.C. 1971) 10
Armstrong v. *United States*, 364 U.S. 40 (1960) 12, 14
Block v. *Hirsh*, 256 U.S. 135 (1921) 10, 11
Cities Service Co. v. *FEA*, No. DC-34 (TECA, Dec. 31, 1975), *petition for cert. filed* (No. 75-1230, Feb. 27, 1976) 2, 10, 14
Condor Operating Co. v. *Sawhill*, 514 F.2d 351 (TECA), *cert. denied*, 421 U.S. 976 (1975) 11
Consumers Union of the United States, Inc. v. *Sawhill*, 512 F.2d 1112 (TECA 1975) 15
Knox v. *Lee*, 79 U.S. (12 Wall.) 287 (1871) 12
Kohl v. *United States*, 91 U.S. 367 (1876) 12
Local 11, Elec. Workers v. *Boldt*, 481 F.2d 1392 (TECA), *cert. denied*, 414 U.S. 1092 (1973) 10
Monongahela Navigation Co. v. *United States*, 148 U.S. 326 (1892) 12
Pasco, Inc. v. *FEA*, No. 10-7 (TECA Oct. 14, 1975) ... 2, 14
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) .. 14

Page

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 9, 13
Richards v. *Washington Terminal Co.*, 233 U.S. 546 (1914) 9
Shell Oil Co. v. *FEA*, No. 5-13 (TECA, Nov. 11, 1975). 15
Thompson v. *Consolidated Gas Corp.*, 300 U.S. 55 (1937) 14
United States v. *Causby*, 320 U.S. 256 (1946) 9
United States v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958) 10, 11
Western States Meat Packers Ass'n v. *Dunlop*, 482 F.2d 1401 (TECA 1973) 10, 11

CONSTITUTION, STATUTES:

U.S. Constitution, Amendment V, § 4 ..... *passim*

Economic Stabilization Act of 1970, note to 12 U.S.C. § 1904
Sections 205-207, 209-211 ..... 2, 3
Section 210(a) 2
Section 211(a) 2
Sections 211(b)(2), (c) 3
Section 211(g) 3

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-56
Section 4(a), 15 U.S.C. § 753(a) 2, 3, 4, 5, 15
Section 4(b)(1), 15 U.S.C. § 753(b)(1) 15
Section 4(b)(2)(A), 15 U.S.C. § 753(b)(2)(A) 4, 13
Section 5(a)(1), 15 U.S.C. § 754(a)(1) 2, 3

Energy Policy and Conservation Act, 89 Stat. 871 5
Section 403(a), 89 Stat. 948 6

Federal Energy Administration Act, 15 U.S.C. §§ 761-766 5

Page

5 U.S.C. § 702 2
28 U.S.C. § 1254(1) 3
28 U.S.C. § 1331 2
28 U.S.C. § 2201 2

REGULATIONS:

10 C.F.R. § 211.62 6
10 C.F.R. § 212.83 7

MISCELLANEOUS:

Entitlements Program, 39 Fed. Reg. 42246 (1974) ... 5
Executive Order 11790, 39 Fed. Reg. 23185 (1974) ... 5
FEA Directive of Jan. 10, 1975, 40 Fed. Reg. 2560 (1975) 5
FEA Ruling 1974-27, 10 C.F.R. at 291 7
S. Rep. No. 94-516, 94th Cong., 1st Sess. (1975) 13
Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971) 12

IN THE

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OCTOBER TERM, 1975

No. 75——

MARATHON OIL COMPANY,

Petitioner

v.

FEDERAL ENERGY ADMINISTRATION;
FRANK G. ZARB, Administrator,
Federal Energy Administration; and
ASHLAND OIL, INC.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Marathon Oil Company ("Marathon") petitions that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals of the United States entered in this case on February 17, 1976.

OPINIONS BELOW

The *per curiam* order of the Temporary Emergency Court of Appeals of the United States, entered on February 17, 1976 (A. 1a),[1] and the order of the United

[1] "(A.)" refers to the separately bound Appendix.

States District Court for the Northern District of Ohio granting final judgment, entered on August 29, 1975 (A. 3a), are not officially reported.[2]

The Temporary Emergency Court of Appeals' *per curiam* order of February 17, 1976, states that two of its other decisions, *Pasco, Inc.* v. *FEA*, No. 10-7 (TECA, Oct. 14, 1975), and *Cities Service Co.* v. *FEA*, No. D.C.-34 (TECA, Dec. 31, 1975), *petition for cert. filed* (No. 75-1230, Feb. 27, 1976), are "dispositive as against all of the contentions" of Marathon. These decisions (not yet reported) are reproduced in the Appendix (A. 83a).

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on February 17, 1976. The District Court had jurisdiction under section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 ("Allocation Act"), 15 U.S.C. § 754(a)(1), which makes sections 205-207 and 209-211 of the Economic Stabilization Act of 1970 ("Economic Stabilization Act"), note to 12 U.S.C. § 1904, applicable to a regulation promulgated under section 4(a) of the Allocation Act; sections 210(a) and 211(a) of the Economic Stabilization Act; 28 U.S.C. §§ 1331, 2201; and 5 U.S.C. § 702.

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[2] By order entered on January 31, 1975, the District Court denied a motion by Marathon for a preliminary injunction and a motion for certification of substantial constitutional questions (A. 27a). This order is not reported. The Temporary Emergency Court of Appeals dismissed Marathon's appeal of the January 31, 1975, District Court order for lack of jurisdiction by order entered on April 21, 1975 (A. 6a). This order is reported at 516 F.2d 1397.

The Temporary Emergency Court of Appeals had jurisdiction to review the judgment of the District Court and to consider the constitutional issues raised in this case under section 5(a)(1) of the Allocation Act, which makes sections 205-207 and 209-211 of the Economic Stabilization Act applicable to a regulation promulgated under section 4(a) of the Allocation Act; and sections 211(b)(2), (c) of the Economic Stabilization Act.

This Court has jurisdiction to review the judgment of the Temporary Emergency Court of Appeals under section 5(a)(1) of the Allocation Act, which makes sections 205-207 and 209-211 of the Economic Stabilization Act applicable to a regulation promulgated under section 4(a); section 211(g) of the Economic Stabilization Act; and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether directives of the President that Marathon make payments to other oil refiners of more than $62 million over a period commencing in January 1975 and continuing as of this date, even if arguably authorized by an act of Congress, violate the fifth amendment because they effect a taking for a private rather than a public use, and because they constitute a taking without just compensation.

2. Whether such directives, even if arguably within the stated objectives of the Emergency Petroleum Allocation Act of 1973, were authorized by that act.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Const. Amend. V, § 4:

> "... nor shall private property be taken for public use, without just compensation."

Section 4(a) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 753(a):

> "... the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation."

Section 4(b)(2)(A) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 753(b)(2)(A):

> "(2) In specifying prices (or prescribing the manner for determining them), such regulation shall provide for—
>
> "(A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level".

The relevant regulations of the Federal Energy Administration are set forth in the Appendix (A. 46a).

STATEMENT

Marathon Oil Company ("Marathon"),[3] under the challenged directives of the Federal Energy Administration ("FEA"),[4] has paid other oil refiners more than $62 million since January 1975. During 1975 Marathon posted checks ranging in amounts from a low of $546 thousand in May to almost $11.6 million in August. With the enactment of the Energy Policy and Conservation Act[5] in December 1975, FEA has continued to issue such directives. Accordingly, Marathon expects that it will be required to make substantial monthly payments to other refiners for several more years.

On December 4, 1974, FEA promulgated in the form of a regulation what is known as the entitlements program. 39 Fed. Reg. 42246 (1974). The preamble to the notice proposing establishment of the program cited section 4(a) of the Allocation Act as statutory authority for the program. 39 Fed. Reg. 31650 (1974). On January 10, 1975, FEA issued its first directive that Marathon and certain other refiners make payments to other oil refiners by the end of that month. 40 Fed. Reg. 2560 (1975) (A. 57a).

Mechanically, the entitlements program imposes an obligation upon a refiner that it have what FEA defines as an "entitlement" for each barrel of "old oil"

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[3] Marathon produces, transports, refines and sells crude oil in the United States and abroad. As a result of substantial past and continuing capital expenditures in exploration and development, Marathon has valuable domestic crude oil resources. Marathon's three domestic refineries are located in Illinois, Michigan and Texas. The company markets gasoline and other petroleum products in the midwestern and the southeastern sections of the United States. It is not a market leader in any state.

[4] The President's authority under the Allocation Act was delegated to the Federal Energy Office ("FEO"). 38 Fed. Reg. 33575 (Dec. 6, 1973). FEA was established by Congress on June 27, 1974, as an independent agency and assumed the authority and responsibility of FEO. Federal Energy Administration Act, 15 U.S.C. §§ 761-766; *see* Executive Order 11790, 39 Fed. Reg. 23185 (June 27, 1974).

[5] 89 Stat. 871.

which it refines in each month.[6] Each month FEA establishes "an adjusted national old oil supply ratio"[7] and "issues" each refiner a number of entitlements equal to the number of barrels of crude oil it refined two months previously, multiplied by the adjusted national old oil supply ratio. If, on the basis of information supplied to FEA by the refiner, FEA determines that the refiner had insufficient entitlements, it directs that refiner to "purchase" entitlements at a certain price per entitlement from oil companies which have a surplus. Since an "entitlement" is simply a creature of the program, the directive is nothing more than a mandate that a refiner pay to another refiner a specified sum of money. This Congress recognized in section 403(a) of the recent Energy Policy and Conservation Act, wherein it is stated that the entitlements program is nothing more than a "cash transfer arrangement." 89 Stat. 948, *amending* 15 U.S.C. § 753.

Refiners which benefit from the program are those whose refinery runs are made up of lower percentages

[6] Old oil is essentially an amount of domestic crude oil produced from a property equal to or less than the amount produced during a base period. This oil may not be lawfully sold at a price higher than a prescribed ceiling price, which has been approximately $5.25 per barrel. Approximately sixty percent of the oil produced in the United States is identified for price control purposes as old oil.

[7] The numerator of the adjusted national old oil supply ratio is the amount of old oil received by all companies in a particular month. The denominator of this ratio is the total number of barrels of crude oil refined by all refiners for that month, and includes, in addition to old oil, "new oil" (a property's production in excess of the base level) and imported crude oil. 10 C.F.R. § 211.62. Prior to the effective date of regulations issued pursuant to the Energy Policy and Conservation Act, new oil was not subject to price controls. It now sells at a prescribed price of approximately $11.28. *See* 41 Fed. Reg. 4931 (Feb. 3, 1976). The federal government has not established price ceilings for imported oil.

of old oil than the adjusted national old oil supply ratio. For instance, under the program Respondent Ashland Oil, Inc. has received more than $130 million. Amerada Hess Corporation has received close to $400 million from Marathon and other refiners.

Although the amount a refiner has been directed to pay another refiner may lawfully be passed through to customers,[8] the program, as structured, provides no reasonable assurance that a refiner required to make payments will be able to recover these payments in the marketplace.

On January 23, 1975, Marathon commenced this action in the United States District Court for the Northern District of Ohio[9] to obtain preliminary and permanent injunctive relief from its January 1975 payment obligation and future payment obligations under the entitlements program. It also sought a declaratory judgment that FEA's promulgation of the entitlements program and its issuance of monthly payment directives were unlawful, and a certification to TECA that there was a substantial question whether the directives were consistent with the fifth amendment to the Constitution. The District Court denied Marathon's motions for preliminary relief on January 31, 1975 (A. 27a). The Temporary Emergency Court of Appeals ("TECA") dismissed Marathon's appeal of the Dis-

[8] 10 C.F.R. § 212.83. However, a portion of a refiner's crude oil costs, which include payments made under the entitlements program, must be allocated to the refiner's own plant fuel, and thus not all crude oil costs may be passed through to customers. FEA Ruling 1974-27, printed at 10 C.F.R. at 291 (1975).

[9] On January 13, 1975, Marathon applied to FEA for administrative relief from its payment obligations. On May 15, 1975, FEA issued a final denial of Marathon's applications, stating that Marathon had exhausted its administrative remedies.

trict Court's order for lack of jurisdiction on April 21, 1975. (A. 6a). On August 27, 1975, Marathon filed a second motion for a preliminary injunction, seeking relief from FEA's August 1975 order that the company pay $11.6 million by the close of that month. On August 29, 1975, the District Court denied this motion and, upon its own motion, entered final judgment against Marathon (A. 3a). On the same date Marathon filed its notice of appeal. On February 17, 1976, TECA affirmed (A. 1a). This petition seeks review and reversal of that judgment.

REASONS FOR GRANTING THE WRIT

1. This petition presents the basic question of whether government directives which require one company to pay a substantial sum of money to another company, which the government has determined to be less able to compete, constitute a taking by the government of private property subject to the limitations of the fifth amendment. The national significance of this issue, as it arises here, is demonstrated by the financial impact which the government's directives under the entitlements program have had, and continue to have, on those companies in the United States engaged in the production and refining of their domestic oil resources. Since January 1975 monthly directives issued by FEA have taken more than $1.5 billion from a limited number of refiners and have conferred these monies directly upon others in the petroleum industry. The program has resulted in extensive federal court litigation involving payors and payees and the imposition of criminal fines upon one refiner which failed to comply.[10]

[10] Gulf Oil Corporation was criminally indicted in the United States District Court for the Western District of Pennsylvania for failure to comply with the initial FEA directive that it make payments by January 31, 1975. On February 19, 1976, the company was fined on a plea of guilty to four counts of the indictment. *United States* v. *Gulf Oil Corp., et al.*, Crim. No. 75-231.

The program imposes the substantial financial burden of subsidizing one group of oil refiners upon a diminishing number of other oil refiners, rather than upon the government.[11] This is in sharp contrast to action recently taken by Congress to reorganize the bankrupt railroads in the northeast and midwest sections of the country. Having determined that the continued operation of portions of these railroads was in the national interest, Congress established a reorganization plan which provided for large infusions of federal money and invitations (not directives) to profitable railroad companies to purchase properties of the bankrupt railroads. Had Congress determined that the financial difficulties of these bankrupt railroads should be redressed through payments to be made by profitable companies, such as the Chessie System, the Regional Rail Reorganization Act of 1973 would have had the same constitutional defects as the program challenged here. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

In times of emergency the government has established controls which limit the return which a person may derive from his property, business or labor. *See,*

[11] The number of companies directed to make payments to other refiners has declined from 53 in March 1975, 40 Fed. Reg. 12466 (1975), to only 19 under FEA's most recent entitlements directive, 41 Fed. Reg. 7461 (Feb. 18, 1976). The diminishing number of refiners required to make these payments is significant in that it gives added emphasis to the point, highly relevant for fifth amendment purposes, that the program is confined in impact to a singled-out category of companies. *See United States* v. *Causby*, 320 U.S. 256 (1946); *Richards* v. *Washington Terminal Co.*, 233 U.S. 546 (1914).

e.g., Block v. *Hirsh*, 256 U.S. 135 (1921); *Western States Meat Packers Ass'n* v. *Dunlop*, 482 F.2d 1401 (TECA 1973); *Local 11, Elec. Workers* v. *Boldt*, 481 F.2d 1392 (TECA), *cert. denied*, 414 U.S. 1902 (1973); *Amalgamated Meat Cutters Union* v. *Connally*, 337 F. Supp. 737 (D.D.C. 1971).[12] Government measures also have temporarily restricted the use of property. *See, e.g., United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958). However, this is the first instance in which the government has required one person to grant a cash subsidy directly to another. The implications of such an assertion of governmental authority require no elaboration.

2. The court below failed to provide an adequate answer to Marathon's claim that the entitlements program works a confiscation of Marathon's property. Thus, the court's primary reliance was on *Block* v. *Hirsh*, 256 U.S. 135 (1921). That case held constitutional an emergency rent control program in the District of Columbia during World War I which was justified to the Court as "only a temporary measure." 256 U.S. at 157. TECA quoted from the opinion of this Court as follows (A. 103a):

> "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change. . . ." *Block* v. *Hirsh*, 256 U.S. at 157.

TECA then stated in reference to the entitlements program:

> "'Whether the challenged regulation and enforcement order would pass muster as a long continuing response to chronic energy problems need not be determined.'"[13]

[12] The first and last of these cases were cited by TECA in *Cities Service*. (A. 103a) The second and third were relied upon by the District Court in *Marathon*. (A. 45a).

Contrary to TECA's perception, the entitlements program must be viewed as "a long continuing response to chronic energy problems". The Allocation Act, first enacted in 1973 with an expiration date of February 28, 1975, has now been extended by Congress four times. The most recent extension, for a period in excess of five years, came before the date of TECA's opinion in *Cities Service* and the date of its order of affirmance in *Marathon*. Under this extension it is reasonable to expect that the entitlements program will continue for several additional years. Accordingly, the constitutionality of the entitlements program should be definitively determined, even if the distinction between a short and a "long continuing response to chronic energy problems" is constitutionally significant.[14]

TECA suggested additionally that the entitlements program limits the use of property and is comparable to rent and price regulations of the kind upheld in *Block* v. *Hirsh*, 256 U.S. 135 (1921), and *Western State Meat Packers Ass'n* v. *Dunlop*, 482 F.2d 1401 (TECA 1973). In those cases, no landlord or meat packer was directed to make cash payments to another landlord or meat packer. The directives here in question are of

[13] TECA quoted from its opinion in *Condor Operating Co.* v. *Sawhill*, 514 F.2d 351, 362 (TECA), *cert. denied*, 421 U.S. 976 (1975).

[14] We, of course, do not concede that the program passes constitutional muster, even if it is viewed as "temporary." As argued below, we submit that it falls in the category of a direct appropriation of private property rather than a regulatory limitation on the use of property. As Mr. Justice Harlan observed in *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 184 (1958) (dissenting opinion), the fifth amendment requires that compensation be paid for "a temporary confiscation. . . ."

a quite different order. They require Marathon to make cash payments to its competitors. As stated in *Knox* v. *Lee*, 79 U.S. (12 Wall.) 287 (1871), there is a taking when there is a "direct appropriation" of property. The appropriation of Marathon's monies under the entitlements program is like a condemnation of real property, which is clearly a taking compensable under the fifth amendment. *See, e.g., Kohl* v. *United States*, 91 U.S. 367 (1876). Whether Marathon has demonstrated a substantial diminution in the company's value after it has paid its competitors (a question to which the court below adverted) is not, in this context, any more relevant than it would be to ask whether the land lost through condemnation was all or only a part of that previously owned. As the Court stated in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893), "just compensation . . . is for the property, and not to the owner."

We do not deny that the lines between "regulation" and "taking", between "impairment of use" and "direct appropriation", are often shadowy. As Mr. Justice Black, writing for the Court, noted in *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960):

> "This case and many others reveal the difficulty of trying to draw the line between what destructions of property by lawful government actions are compensable 'takings' and what destructions are 'consequential' and therefore not compensable."[15]

[15] *See also* Sax, *Takings, Private Property and Public Rights*, 81 *Yale L.J.* 149 (1971). Professor Sax begins his article with the observation that:

> "Few legal problems have proved as resistant to analytical efforts as that posed by the Constitution's requirement that private property not be taken for public use without payment of just compensation. Despite the intensive efforts of commentators and judges, our ability to distinguish satisfactorily between 'taking' in the constitutional sense, for which compensation is compelled, and exercises of the police power, for which compensation is not compelled, has advanced only slightly since the Supreme Court began to struggle with the problem some eighty years ago." (Footnotes omitted.)

We submit that the instant program falls clearly on the "direct appropriation" side of the line. In all events, however, the difficulties inherent in deciding when there has been a taking emphasize the importance of review by this Court when the issue arises, as it does here, in the context of a program that is both novel in its features and enormous in its consequences.

3. The "taking" issue cannot be avoided on the ground that some of the costs incurred in the purchase of entitlements may be passed through.[16] Just compensation means something more—namely, a "reasonable, certain and adequate provision for obtaining compensation." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974). As Congress itself has recognized, "the competitive pressures of the marketplace" have prevented some refiners from recouping substantial amounts of their crude oil costs. Conf. Rep. on "Energy Policy and Conservation Act", S. Rep. No. 94-516, 94th Cong., 1st Sess. 195 (1975). Plainly, this is true of the future as well as the past. There can be no certainty that Marathon will be able to pass on to its customers the amounts that it is required to pay to its competitors.

4. As pointed out above, the entitlements program requires some refiners to make payments to other re-

[16] Section 4(b)(2)(A) of the Allocation Act, 15 U.S.C. § 753(b)(2)(A), permits a "dollar-for-dollar pass-through of the net increases of crude oil . . . to all marketers or distributors at the retail level".

finers in order to improve the competitive position of the latter. This is not only a taking; it is, we submit, a taking for non-public use. We assume that the government may elect to subsidize refiners heavily dependent on foreign oil. The fifth amendment, however,

> "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960).

"[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 416 (1922).

The instant case is closely analogous to *Thompson* v. *Consolidated Gas Co.,* 300 U.S. 55 (1937), in which this Court was asked to uphold a proration order that Consolidated Gas and other producers owning pipeline facilities purchase designated quantities of gas from unconnected producers, thus requiring them to fulfill their contracts in part with the natural gas of the unconnected producers, rather than with their own. Justice Brandeis, speaking for a unanimous Court, rejected that program:

> "Our law reports present no more glaring instance of the taking of one man's property and giving it to another." 300 U.S. at 79-80.

5. Review of this case is appropriate for the additional reason that TECA's decisions in *Cities Service* and *Pasco* are inconsistent with the approach adopted by the United States Court of Appeals for the District of Columbia Circuit in *Algonquin, SNG, Inc.* v. *FEA,*

518 F.2d 1051 (D.C. Cir.), *cert. granted,* 44 U.S.L.W. 3236 (U.S. Nov. 3, 1975) (No. 75-382). In that case, now pending before this Court, the court of appeals declared an oil import license fee program to be in excess of statutory authority because there was no "clear statutory directive" that it be implemented.

The approach of the court of appeals in *Algonquin* to the exercise of executive power is valid here, for section 4(a) of the Allocation Act does not authorize a program of this nature. In the instant case TECA erred in failing to adequately distinguish between the empowering section of the Allocation Act and the objectives which Congress set forth in section 4(b)(1) (A. 89a-92a), and in so doing deviated from its approach in *Consumers Union of the United States, Inc.* v. *Sawhill,* 512 F.2d 1112 (TECA 1975), and *Shell Oil Co.* v. *FEA,* No. 5-13 (TECA, Nov. 11, 1975).

CONCLUSION

The existing case law—formed in other times to cope with other problems—is inadequate guidance when, under guise of "regulation", the government takes private property for private use without just compensation. This petition should accordingly be granted.

Respectfully submitted,

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